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In The Supreme Court of the United States

BRUCE J. GERMAN,
Petitioner,

v.

THERM-O-DISC, INC., AND OLD REPUBLIC INSURANCE COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Ohio

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*ROBERT W. KERPSACK
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215

614-242-1000

Attorney for Petitioner
**Counsel of Record*

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LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

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INTRODUCTION

Pursuant to Rule 15-6 of the Rules of the Supreme Court of the United States, Petitioner Bruce J. German (hereinafter "German") submits this Reply Brief in response to the Brief in Opposition of Respondents Therm-O-Disc, Inc., and Old Republic Insurance Company. Respondents' Brief in Opposition demonstrates why German's Petition for a Writ of Certiorari should be granted. In direct violation of Section One of the Fourteenth Amendment to the United States Constitution, German and other citizens similarly situated to him are victims of a political process that has thwarted the stability and predictability of the civil justice system in this country.

STATEMENT OF THE CASE

Petitioner Bruce J. German respectfully submits that Respondents cite and misstate four material facts in their Statement Of The Case. First, Respondents erroneously state that German was not a party to the insurance contracts at issue. In fact, German was not a "named insured;" however, the trial court and the court of appeals expressly found that German was an "insured" pursuant to the express terms of the policies. Throughout the state court proceedings, Respondents never argued or appealed the issue that German was *not* an insured under the policies.

Secondly, Respondents note that German was not acting in the course and scope of his employment at the time of the motor vehicle collision giving rise to his underinsured motorist claims in question. The trial court and the court of appeals expressly found, however, that German was an insured under the insurance policies at issue, regardless of he was acting in the course and scope of his employment. Contrary to Respondents' assertions, this issue was neither raised nor preserved on appeal to the Ohio Supreme Court.

Thirdly, Respondents allege that they never conceded the validity of the Ohio Supreme Court's decision in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St. 3d 660(1999), 710 N.E.2d 1116. Throughout the state court proceedings, however, Respondents never argued or appealed the issue that Scott-Pontzer was wrongly decided.

Finally, Respondents erroneously allege that no court ever entered judgment in favor of German on his underinsured motorist claim in question. In fact, the state trial court entered summary judgment in favor of German on his underinsured motorist claim and ordered the matter to proceed to trial on the factual issue of the value of German's claim. After the jury returned a verdict in favor of German in the amount of $1,490,023.00, the trial court entered final judgment in favor Respondents, finding that

the Old Republic policies at issue provided underinsured motorist coverage with a deductible amount of $2 million. Of course, the state court of appeals reversed the court's judgment on this issue, and this is the only issue that Respondents preserved on appeal to the Ohio Supreme Court.

REASONS FOR GRANTING THE PETITION

Respondents assert that it is a well-settled principle of Ohio law that decisions of the Supreme Court of Ohio have retroactive effect. Respondent fails to note, however, that Ohio has adopted two general exceptions to its retroactivity doctrine: 1) Where contractual rights have arisen under a prior decision; or 2) Where vested rights have been acquired under the prior decision. See Peerless Elec. Co. v. Bowers,164 Ohio St. 209(1955), 210, 129 N.E.2d 467. In opposing the present petition, Respondents argue only that German's possesses no "vested" rights for which he was entitled to procedural or substantive due process. German respectfully submits, however, that he possesses "acquired" rights under the Ohio Supreme Court's prior Scott-Pontzer decision, which fall squarely within the first exception to the Peerless doctrine.

In Scott-Pontzer, the Ohio Supreme Court interpreted the identical insurance policy form that is at issue in the present case. This standard Business Auto Coverage form was widely used throughout the commercial insurance industry during the 1990's. Prior to the Scott-Pontzer decision, no Ohio court had ever interpreted this Business Auto Coverage Form to provide un/underinsured motorist coverage by operation of the Ohio Uninsured Motorist Statute to employees like German, who were injured in motor vehicle collisions

occurring outside the scope of employment. Pursuant to the Scott-Pontzer holding, employees like German were held to be insureds under the un/underinsured motorist coverage provided by their employers' commercial insurance policies, regardless of whether the motor vehicle collision in which they were involved occurred in the scope of employment. Following the Scott-Pontzer decision, un/underinsured motorist claims like German's were widely referred to as "Scott-Pontzer claims." Pursuant to Scott-Pontzer, employees like German acquired a common law right of action to recover un/underinsured motorist benefits for injuries and damages arising from motor vehicle collisions occurring outside the course of employment.

In opposing the present petition, Respondents argue erroneously that the Ohio Supreme Court acted appropriately in treating German's underinsured motorist claim differently from the Scott-Pontzer claimant's underinsured motorist claim. However, German is presenting an underinsured motorist claim under the exact same circumstances that were present in Scott-Pontzer. The Ohio Supreme Court held the Scott-Pontzer claimant to be an insured under the exact same Business Auto Coverage Form at issue in the present case. In fact, prior to Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, many Ohio and federal courts held un/underinsured motorist claimants identically situated to

German to be insureds under the Business Auto Coverage Form at issue in the present case. As a matter of federal constitutional law, therefore, German is entitled to equal protection of the Scott-Pontzer decision, which created a common law right of action to recover un/underinsured motorist coverage under the circumstances at issue in the present case. U.S. Const. amend. XIV.

German's substantive property right to un/underinsured motorist coverage benefits, pursuant to Scott-Pontzer, conflicts with the subsequent decision of the Ohio Supreme Court in Galatis, which requires that an employee be injured in the scope and course of employment in order to be insured under the un/underinsured motorist coverage of a corporate employer's business automobile insurance policies. Regardless of whether Scott-Pontzer or Galatis was rightly or wrongly decided, the Ohio Supreme Court summarily extinguished German's underinsured motorist claims by applying Galatis to the present case, in violation of German's federal constitutional rights. Accordingly, this Court should grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

By failing to address the issue in their Brief in Opposition, Respondents apparently concede that the Ohio Supreme Court's summary reversal of the present case,

without a hearing or notice to German, serves as an example of how the politics of judicial elections can, if left unchecked, adversely affect the substantive common law. By enacting the due process and equal protection clauses, however, the drafters of the federal Constitution sought to ensure that political elections could never adversely affect our substantive common law. Even though the present case was not an appropriate procedural vehicle for the retroactive application of Galatis, the Ohio Supreme Court, pursuant to a 4-3 vote, summarily reversed the Court of Appeals judgment in the instant action, without ever notifying German that his rights were before the Court, either in the present case or in Galatis. Allowed to stand, the erroneous actions of the Ohio Supreme Court in the present case shall serve as a dangerous precedent that the federal constitution provides no protection against the bending of our substantive common law at the will of politics. In order to preserve the stability and predictability of our justice system, this Court must grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of the State of Ohio should be granted.

Respectfully submitted.

ROBERT W. KERPSACK CO., LPA

Robert W. Kerpsack (MN)
ROBERT W. KERPSACK
Attorney for Petitioner, Bruce J. German
21 East State Street, Suite 300
Columbus, OH 43215
Telephone: (614) 242-1000